

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Alaska,  
Division No. 1.

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FILED  
AUG 28 1913



No. 2308

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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 930—B.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ARTHUR B. CALLAHAM,

Defendant and Plaintiff in Error.

J. W. RUSSELL, Juneau, Alaska, Attorney for  
Plaintiff and Defendant in Error.

SHACKLEFORD & BAYLESS and Z. R.  
CHENEY, Juneau, Alaska, Attorneys for De-  
fendant and Plaintiff in Error.

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*In the District Court for the District of Alaska,  
Division No. 1.*

Before the Hon. FRED M. BROWN, District Judge,  
Sitting as a Magistrate.

UNITED STATES OF AMERICA

vs.

ARTHUR B. CALLAHAM.

**Complaint.**

Chapter 54, Laws of Alaska, 1913.

The defendant, Arthur B. Callaham, is accused in this complaint by John B. Marshall of being guilty of a misdemeanor, committed as follows, to wit:

That the said Arthur B. Callaham, on the 1st day

of March, 1913, was, ever since has been, and now is a male person, residing at Juneau, Alaska, and within said District, over the age of twenty-one years, and under the age of fifty years, and that he is neither a soldier, a sailor in the United States navy or revenue cutter service, a volunteer fireman, pauper, insane person, nor territorial charge.

That complainant is the duly appointed, qualified and acting United States Commissioner in and for the Juneau Precinct of Division No. 1, District of Alaska, and that as such commissioner he duly caused to be published in "The Alaska Daily Empire," a newspaper of general circulation published within said precinct, a notice setting forth that the poll tax provided for by Chapter 54 of the 1913 Laws of Alaska was due and payable on or before the 4th day of August, 1913, and that the payment thereof would become delinquent on the 5th day of August, 1913, and warning all persons to pay the same, and that in case of failure to pay said poll tax such persons would be liable to the penalties prescribed by said act.

That the said Arthur B. Callaham did not pay the said poll tax, and that thereafter, on the 7th day of August, 1913, and between the hours of 11 A. M. and 12 M. of said day, complainant, acting as such commissioner, personally served upon the said Arthur B. Callaham, at Juneau, Alaska, a notice in writing, as follows:

"Mr. A. B. Callaham, [1\*]

I hereby demand of you payment of your poll

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\*Page-number appearing at foot of page of original certified Record.



tax for the year 1913, as provided in Chapter 54 of the Laws of 1913, and I hereby give you notice that you are already delinquent by reason of your non-payment of said poll tax for the year 1913, and that you are now subject to the penalties provided for by said act.

JOHN B. MARSHALL,

U. S. Commissioner and Ex-officio Poll Tax Collector."

That the said Arthur B. Callaham wilfully and feloniously refused to pay said poll tax, and still wilfully and feloniously refuses to pay the same, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN B. MARSHALL.

District of Alaska,  
Division No. One,—ss.

John B. Marshall, being duly sworn, deposes and says that he has read the foregoing complaint, and that the same is true as he verily believes.

JOHN B. MARSHALL.

Subscribed and sworn to before me this 7th day of August, 1913.

FRED M. BROWN,

District Judge, Acting as a Magistrate.

[Endorsed]: In the District Court for the District of Alaska, Division No. 1. United States of America vs. Arthur B. Callaham. Complaint—Chapter 54, Laws of Alaska, 1913. Filed in the District Court, District of Alaska, First Division. Aug. 7,

1913. E. W. Pettit, Clerk. By H. Malone, Deputy.  
[2]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Demurrer.**

Comes now the above-named defendant and demurs to the complaint on file herein, for the reason that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a crime.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Defendant.

Due service of a copy of the within is admitted this 9th day of August, 1913.

J. W. RUSSELL,  
Attorney for Complainant.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. United States of America, Plaintiff, vs. Arthur B. Callaham, Defendant. Demurrer. Shackleford & Bayless, Attorneys for Defendant. Office, Juneau, Alaska. Filed in the District Court,

District of Alaska, First Division. Aug. 9, 1913. E.  
W. Pettit, Clerk. By —————, Deputy. [3]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

#930—B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

### **Judgment and Sentence.**

Complaint having been filed in the above-entitled court and cause against Arthur B. Callaham, charging said defendant with violation of Chapter 54, Laws of Alaska, 1913; and the said Arthur B. Callaham having filed and submitted his demurrer to the said complaint and to the whole thereof; and the said demurrer having been by this Court in all respects disallowed and overruled; and the said defendant, Arthur B. Callaham, at Juneau, in said Division and District, on Saturday, the 9th day of August, 1913, having duly appeared personally in open court accompanied by his attorneys, Messrs. Shackleford & Bayless, and Z. R. Cheney, and then and there in open court refused to plead to said complaint and having given his notice of election to stand upon said demurrer and not further plead and to take advantage of the provisions of Section 97 of Carter's Alaska Criminal Code of Procedure and to submit to judgment thereunder;

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the said Arthur B. Callaham is guilty of the offense charged in said complaint herein.

And it is further ordered, adjudged and decreed that you, the said Arthur B. Callaham, defendant in the above-entitled cause, in punishment of the offense aforesaid of which you have been adjudged guilty as charged, [4] be and you are hereby sentenced to pay a fine in the sum of five dollars (\$5.00), together with the costs of this action.

Done in open court at Juneau, Alaska, this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

To the whole of which judgment and sentence, and each and every part thereof, the defendant excepts and his exceptances are allowed.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ———, Deputy. [5]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Petition for Writ of Error and Order Allowing Same.**

Comes now Arthur B. Callaham, defendant in the above-entitled cause, and feeling himself aggrieved by the judgment of the Court entered on the 9th day August, 1913, adjudging him guilty of the offense charged in the complaint herein and sentencing him to pay a fine of \$5.00, together with the costs of the action, and petitions the said Court for an order allowing the defendant a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, to review the said judgment and proceeding, and further petitions that the said appeal be heard at the next term of said court at Seattle, State of Washington.

Dated at Juneau, Alaska, August 9, 1913.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ————, Deputy. [6]

**[Order Allowing Writ of Error, etc.]**

Now on this 11th day of August, 1913, it is ordered that the writ of error above prayed for be allowed; and it is further ordered that the said writ of error shall be and operate as a supersedeas and that the execution of judgment herein be suspended forthwith.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By —————, Deputy. [7]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

**Writ of Error [Original].**

United States of America,  
District of Alaska,—ss.

The President of the United States to the Honorable, the Judge of the District Court for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said



District Court before you, between the United States of America, plaintiff, and Arthur B. Callaham, defendant, a manifest error hath happened to the great damage of the defendant, Arthur B. Callaham, plaintiff in error, as by his complaint appears.

We are willing that error, if any has been, should duly be corrected and full and speedy justice be done to the said party in this behalf, and do command you that then, under your seal, you send the record and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, State of California, together with this writ, so as to have the same at said place in said District Court within thirty (30) days from the date of this writ, that the record and proceedings aforesaid being inspected, the Circuit Court of Appeals may cause further to be done therein to correct these errors at the next term of said Court to be held at Seattle, Washington, [8] as according to the right and the laws and customs of the United States of America should be done.

WITNESS, the Honorable EDWIN DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 11th day of August, 1913.

WITNESS the hand and seal of the District Court for the District of Alaska, Division No. 1, at the Clerk's Office at Juneau, Alaska, this 11th day of August, 1913.

[Seal]

E. W. PETTIT,  
Clerk of the District Court for the District of  
Alaska, Division No. 1.

Allowed this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

Due service of the foregoing writ of error is hereby  
admitted this 11th day of August, 1913.

J. W. RUSSELL,  
Attorney for Defendant in Error. [9]

[Endorsed] Filed in the District Court, District  
of Alaska, First Division. Aug. 11, 1913. E. W.  
Pettit, Clerk. By —————, Deputy, [10—11]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

**Citation [on Writ of Error (Original)].**

United States of America,  
District of Alaska,—ss.

The President of the United States of America to  
the United States and to J. W. Russell, Attor-  
ney for Defendant in Error:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held in the city of  
Seattle, State of Washington, within thirty (30)  
days from the date of this citation, pursuant to a



writ of error filed in the Clerk's Office of the District Court for the District of Alaska, Division No. 1, wherein Arthur B. Callaham is plaintiff in error and the United States of America is defendant in error to show cause, if any there be, why judgment in said writ of error mentioned should not be reversed and speedy justice should not be done to the said Arthur B. Callaham in that behalf.

Witness, the Honorable EDWIN DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 11th day of August, 1913.

FRED M. BROWN,

Judge of the District Court for the District of Alaska, Division No. 1.

[Seal]

Attest: E. W. PETTIT,

Clerk of the District Court for the District of Alaska, Division No. 1. [12]

Due service of the foregoing citation is hereby admitted this 11th day of August, 1913.

J. W. RUSSELL,

Attorney for Defendant in Error. [13]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ———, Deputy. [14—15]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Assignment of Errors.**

Comes now the petitioner, Arthur B. Callaham, in the above-entitled action, and assigns the following errors as having been committed by the Trial Court in the proceedings in the above-entitled action upon which the petitioner intends to and does rely in prosecuting his writ of error herein:

1. The Court erred in overruling the demurrer of said petitioner to the complaint as a whole;

2. The Court erred in entering judgment against the petitioner herein;

3. The Court erred in sentencing the petitioner herein under said judgment.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Petitioner.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ———, Deputy. [16]

*In the District Court for the District of Alaska, Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that a judgment having been rendered on the 9th day of August, 1913, whereby Arthur B. Callaham, the above-named defendant, was adjudged guilty of the offense charged in the complaint on file herein and sentenced to pay a fine of the sum of five dollars (\$5.00), together with the costs of this action, and the said defendant having sued out a writ of error and appealed from said judgment and having been duly admitted to bail in the sum of \$250.00.

I, Henry Shattuck, residing at Juneau, Alaska, merchant and manufacturer by occupation, hereby undertake that the above-named Arthur B. Callaham shall in all respects abide and perform the orders and judgments of the Appellate Court upon appeal, or if he fail to do so in any particular, that I will pay the United States the sum of \$250.00.

Dated at Juneau, Alaska, August 11, 1913.

HENRY SHATTUCK.

Taken and acknowledged before me the day and year above written.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1. [17]  
United States of America,  
District of Alaska,—ss.

Henry Shattuck, being first duly sworn, on oath deposes and says: I am a resident of the town of Juneau, District of Alaska, and am not a counsellor or attorney at law, marshal, clerk of any court, or other officer of any court; that I am worth the sum of \$250.00, exclusive of property exempt from execution and over and above all just debts and liabilities.

HENRY SHATTUCK.

Subscribed and sworn to before me this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

Approved:

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By H. Malone, Deputy. [18]

**[Praeceptum for Transcript of Record.]**

SHACKLEFORD & BAYLESS,  
Attorneys and Counsellors at Law,  
Juneau, Alaska.

August 9, 1913.

Mr. E. W. Pettit,  
Clerk of the District Court,  
Division No. 1,  
Juneau, Alaska.

Dear Sir:—

Please prepare the record for appeal in the case of the United States vs. Arthur B. Callaham, in the District Court, and certify the following papers, to wit:

1. Copy of Complaint.
2. Copy of Demurrer.
3. Judgment on Demurrer and Sentence.
4. Appeal papers.
  - a. Petition for Appeal.
  - b. Order Allowing Appeal.
  - c. Writ of Error.
  - d. Citation.
  - e. Assignment of Errors.
  - f. Appeal Bond.

When so prepared you will kindly transmit this record to the United States Circuit Court of Appeals at San Francisco.

Very truly yours,  
SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. [19]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

*In the District Court for the District of Alaska,  
Division Number One at Juneau.*

No. 930-B.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ARTHUR B. CALLAHAM,

Defendant and Plaintiff in Error.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the above and foregoing and hereto attached nineteen pages of typewritten and written matter, numbered from one to nineteen, both inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the defendant and plaintiff in error, on file in my office, and made a part hereof, in Cause No. 930-B, of the above-entitled court, wherein the United States of America is plaintiff and defendant in error, and Arthur B. Callaham is defendant and plaintiff in error.

I do further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Six and 95/100 Dollars (\$6.95), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court this 11th day of August, 1913.

[Seal] E. W. PETTIT,  
Clerk of District Court, Dist. of Alaska, Division  
No. 1.

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[Endorsed]: No. 2308. United States Circuit Court of Appeals for the Ninth Circuit. Arthur B. Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Received and filed August 20, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





7

IN THE  
**UNITED STATES CIRCUIT COURT**  
**OF APPEALS**  
FOR THE NINTH CIRCUIT

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ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

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ARTHUR B. CALLAHAM for him-  
self and all Male Residents of Ju-  
neau Precinct,  
Appellant,  
vs.

JOHN B. MARSHALL, as United  
States Commissioner for the Ju-  
neau Precinct and Ex-officio Col-  
lector of Poll Tax,  
Apellee.

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**BRIEF OF APPELLANT AND PLAINTIFF IN ERROR**

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STATEMENT OF CASE

The two causes above entitled involve the same questions with reference to the validity of the attempted collection of poll tax in the Territory of Alaska for the year 1913, and for this reason the

brief herein has been entitled in both cases and the same brief filed in both of the causes above entitled. The case of Callaham against Marshall arose through injunction proceedings, seeking to enjoin the collection of the poll tax. The complaint in the case was demurred to by the defendant and the demurrer sustained, and judgment entered against the plaintiff, Callaham, and an appeal taken to this Court. The case of Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error, arose from a criminal information filed in the District Court for the District of Alaska, charging Callaham with the crime of wilfully and feloniously failing to pay his poll tax; to this information or complaint the defendant Callaham demurred and the demurrer was overruled and a judgment entered against Callaham. Pursuant to Section 97 of the Code of Criminal Procedure for the District of Alaska, Callaham sued out his writ of error.

The necessity of contesting the poll tax law within a short time gave rise to an order from the District Court setting the cases for disposition by the Circuit Court of Appeals at its next Seattle session. The short time allowed in which to bring this matter to issue at the Seattle session has compelled the plaintiff in error and appellant to write his brief before the printed record has reached him, but the record is so short that references to the pages of the record have been omitted; in each case the original pleadings, demurrer and judgment being the only matters of record before the lower court.

## SPECIFICATION OF ERRORS

First: The lower court erred in overruling the demurrer of the defendant (a) to the complaint in the injunction case; (b), to the complaint or criminal information in the criminal case.

Second: The court erred in giving and entering judgment against the defendant upon the record herein (a) in the injunction case; (b), in the criminal case.

## BRIEF AND ARGUMENT

The specification of errors above set forth raises two questions: first, that the poll tax law passed by the first legislature for the Territory of Alaska, approved May 1, 1913, violates the organic act providing for a legislature for the Territory of Alaska in that it provides for the levy and collection of the tax by the United States Commissioner, who is "a person who is holding a commission or appointment under the United States" and who, by the provisions of the poll tax act, holds an "office under the government of the Territory" of Alaska. The second proposition involved in these two cases is that the poll tax act, approved May 1, 1913, passed by the territorial legislature, provides for an annual tax which should be levied upon the first of March of each year in accordance with the provisions set forth in the said poll tax act, and that, therefore, the act did not contemplate the collection of said tax until after the first of March, 1914.

THE DESIGNATION OF UNITED STATES COMMISSIONERS AS POLL TAX COLLECTORS IS IN VIOLATION OF THE ORGANIC ACT PROVIDING FOR A LEGISLATURE FOR THE DISTRICT OF ALASKA.

When Congress provided for a legislative assembly for the District of Alaska, it placed certain limitations upon the power of that assembly, and, anticipating a probable tendency on the part of the legisla-

ture to impose additional duties upon the officers who had held their offices by virtue of congressional acts and anticipating the probable incompatibility of such duties, Congress provided by Section 11 of the organic act (37 Statutes at Large, page 512) that:

“No person holding a commission or appointment under the United States \* \* \* \* \* shall hold any office under the government of said Territory.”

Among the various definitions of “office” which have been given by the authorities and which are collected in 29 Cyc. 1361-1364, are the following:

“A duty, charge or trust; a place of trust; a position to which certain duties are attached; a right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it; a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as those of bailiffs, receiver, and the like; \* \* \* a position or appointment entailing certain rights and duties; \* \* \* a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance; a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; \* \* \* a particular duty, charge or trust, conferred by public authority and for public purpose. In a stricter legal sense an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental; a public station or employment conferred by the appointment of government; a right and duty confer-

red on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has fixed to the service; a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public; an appointment or authority on behalf of the government to perform certain duties; \* \* a special duty, trust, or charge, conferred by authority, and for a public purpose.”

From the foregoing definitions it is apparent that the Legislature has conferred upon the commissioners “a special duty, trust or charge” in prescribing that they shall collect poll taxes. Therefore, they have conferred upon the commissioners public offices. The fact that no particular name has been applied by the legislature to the persons designated to collect poll taxes is immaterial. The commissioners have been made collectors of poll taxes just as fully and truly as if the persons chosen to perform that duty were by the act specifically designated “collectors of poll taxes.” The office, namely, “the special duty, trust or charge”, has been created, and the commissioners have been chosen to perform the same; indeed, section 9 of the act explicitly recognizes the duty or charge laid by this act upon the commissioner as an office, for it provides that the commissioner before entering upon his duties shall give a bond “conditioned for the faithful discharge of the duties of his office”.

In *Shelby v. Aleorn*, 36 Miss. 273, the question arose whether under a statute similar to Section 11



of our organic act a person who held the office of senator in that state was eligible to the office of levee commissioner of a county in the state; and among other things the Court said:

“The law itself provides that the levee commissioner shall hold his office for the term of two years, under such restrictions as are herein prescribed. He is required to give bonds, and to discharge the duties of treasurer, in which position he is entitled to receive large sums of public money. The board of police, under the report of the levee commissioner as to the cost of the work to be done, is required to levy a sufficient tax to meet it; and he is required to take an oath ‘that he will in all things touching his office, seek to promote the best interests of his county and the State of Mississippi.’ These directions, of themselves, without doubt, define the character of the place of levee commissioner, and determine it to be an office.”

And this case is quoted with approval in *Attorney General v. Common Council* (Mich.) 70 N. W. 450, 452. And in 29 Cyc. 1386, it is said:

“One of the usual necessary formalities for the qualification of an officer is the taking of the official oath. One who is appointed or elected to office and does not take the required official oath does not possess the legal title to the office.”

And again it is said:

“An official bond is an obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office, or, as the term is used in statutes, the bond of a public officer. Generally the filing of the official bond is like the taking of the official oath regarded as a necessary prerequi-

site to the full legal title to the office. In the absence of a contrary statutory provision a person holding two separate offices must give two separate official bonds.”

And in the same place it is said:

“The fact that the legislature imposes new duties upon an officer will not require him to take a new oath of office.”

Therefore, it is manifest that the legislature itself considered the position of collector of poll taxes as an office, for it exacted a bond from the commissioner for the faithful performance of the duties of poll tax collector and clearly, under the authorities, the legislature correctly deemed the position an office—a new office; for if it had considered that the statute merely imposed new duties on the commissioner the legislature would not have exacted a new and separate bond.

The poll tax act is copied in full in the complaint in the injunction case and reference is made to the same for the purpose of ascertaining the provisions of the act. Section 9 of the act provides that the commissioner shall give a bond to the Territory of Alaska “for the faithful discharge of the duties of his office”; Section 10 provides that the commissioner shall keep an accurate account of all moneys received by him under the provisions of the poll tax act and receive as full compensation 15 per centum of all taxes collected.

It is plain to be seen that the provisions of this



act imposed upon the commissioner new duties not contemplated by the acts of Congress which had created the office of United States Commissioner many years before; that he was accountable not to the United States for the performance of these duties, but to the Territory and its officers alone.

The act of May 17, 1884, (23 Stat. L. p. 24), providing for civil government in the District of Alaska, Sec. 5, provided:

“There shall be appointed by the President four commissioners in and for said District, who shall have the jurisdiction and powers of commissioners of the United circuit courts in any part of said District.”

The act of Congress of June 6, 1900, making further provisions for civil government in Alaska, Sec. 6, provided:

“The respective judges of the court shall appoint and at their pleasure remove clerks, and commissioners in and for the District \* \* \* \* \* The commissioners shall be ex-officio, justices of the peace, recorders, and probate judges.”

At the time of the passage of the act providing for the organization of the first territorial legislature it is self evident that any commissioner in the District of Alaska was a “person holding a commission or appointment under the United States.” The commissioners were the creations of the acts of Congress relating to Alaska, and were appointed by the United States judges, who were also creations of the

acts of Congress relating to Alaska and represented the United States in the Territory of Alaska and were accountable only to the United States. If the persons who held office under these organic acts were not persons "holding a commission or appointment under the United States", then there were no persons in the District holding commissions or appointments under the United States. All of the active duties connected with the levy and collection of this tax under the poll tax act were imposed upon the United States commissioners, and the result is that we have an act of the territorial legislature which, first, compensates the commissioners with fifteen per centum of all taxes collected and gives them a personal interest in the collection of all the taxes, which provides that they shall give such notices and take such action toward the distraint of property as shall end in the collection of the tax; and which makes it a crime to violate the provisions of the act levying the tax. The result, therefore, is that the United States commissioner occupies the position of tax collector for the Territory, is called upon to exercise the duties of a constable or marshal in seeing that the tax is collected, and finally, by reason of the criminal jurisdiction of the United States commissioner, he is made a judge of the guilt or innocence of any person who is charged with failing to pay his poll tax when at the same time he has a pecuniary interest in the collection of the tax. In addition to the duplicity of offices prohibited by Sec. 11 of the organic act providing for a territorial legislature, we

have also an incompatibility of offices which is in violation of the common law. By the act of Congress of June 6, 1900, 31 Stat. L. 321, 552, carried into Carter's Code, Part V., Sec. 567, and Compiled Laws of Alaska, Sec. 796, it is provided:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska.”

And at the common law two incompatible offices could not be held by the same person. The assumption of the second constituted and was *ipso facto* a vacation of the first office. The office of commissioner is incompatible with that of poll tax collector. For the commissionership is a judicial office and the poll tax collectorship is an executive office. If a person fails to pay his poll tax, the collector “must collect by seizure and sale of any personal property owned by such person, and any personal property thus seized shall be sold as provided by law for the sale of personal property in execution, except that three days’ notice of the time and place of sale shall be sufficient.” (Sec. 6.) Thus the collector is given the duties of a marshal—executive duties—to perform. And Section 12 makes any violation of the provisions of the act a misdemeanor. Therefore a failure to pay the tax would be a crime punishable in the court of the commissioner as *ex-officio* justice of the peace, i. e. the commissioner would be both the private prosecutor and the judge, for he would

naturally be the person who must swear to the complaint charging failure to pay the tax. Therefore we have this predicament: The commissoiner as executive officer demands the tax; payment is refused; as executive officer he makes and swears to a complaint before himself as a judicial officer and, conversely, as judicial officer he listens to himself as private prosecutor; and as judicial officer he tries the accused. He is at one and the same time and in the same proceeding private prosecutor, witness and judge. In effect he is a party in the case and the judge of his own case. Could two offices be more violently antagonistic and incompatible?

In *State v. Goff* (R. I.) 9 Atl. 226, 227, it is said:

“The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. In *Rex v. Pateman*, 2 Term R. 777, it was declared that, where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rex v. Tizzard*, 9 Barn. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: ‘If the same person could hold both offices, he would in fact sit in judgment on his own acts.’ In England a sheriff’s duties are ministerial, and, to a limited extent, also judicial. While these

peculiar functions are recognized, in some cases, as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case. *Widow v. Clerks*, 1 Cro. Eliz. 76, case 38. \* \* \*

“Under our law there is no such confusion of duties. In this state, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer’s return, and to allow or disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made by himself, if he were also judge, unless aided by special legislation.

\* \* \* “We think the offices of justice of a district court and deputy sheriff are incompatible, and that, by accepting the latter, the respondent vacated the former.”

The same view was held in the case of *Stubbs v. Lee*, (Me.) 18 Am. Rep. 251, where the court said:

“The defendant having been appointed and sworn as a deputy-sheriff must be regarded as having accepted that office. By that acceptance he sur-



rendered the office of trial justice, a judicial office incompatible with that of a deputy-sheriff. His judicial authority, therefore, as a trial justice was at an end."

In his work on Public Officers, Mr. Mechem says, Sec. 422:

"Incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

And among the offices which he says the authorities have held to be incompatible, so that an acceptance of the second vacates the first, are the following: town clerk and alderman; trial justice and deputy-sheriff; justice of the peace and constable; justice of the peace and sheriff or deputy-sheriff; member of a prudential committee and auditor of a school district; state solicitor and member of congress, city alderman and city marshal; postmaster and judge of the county court.

We submit, therefore, that the poll tax act, which imposes all of the active and important duties of the collection of poll tax upon the United States commissioner, is void for the reason that it overrides the restrictions placed by Congress upon the territorial legislature and violates the principles of the common law.

SECOND: THE ACT OF THE ALASKA LEGISLATURE, PROVIDING FOR THE COLLECTION OF A POLL TAX IN THE TERRITORY, APPROVED MAY 1, 1913, DID NOT CON-

TEMPLATE THE COLLECTION OF A POLL  
TAX PRIOR TO THE YEAR COMMENCING  
MARCH 1, 1914.

The record in this case has been made up pro forma for the purpose of testing this law before the Circuit of Appeals we assume upon the theory that it was the duty of the District Court for the District of Alaska to sustain the law in favor of the contention of the tax collector and force the burden of the appeal upon the person protesting against the tax. There is nothing in the record to enlighten this Court or counsel for the plaintiff in error and appellant upon what ground the lower court proceeded in holding that it was a crime to refuse to pay a poll tax before March 1, 1914, and in holding that the tax was collectible prior to that date; and we are at a loss, therefore, to present any authorities except references to the provisions of the act itself, and we are unable to reach any other conclusion than that the legislature had no intention whatever of collecting the tax until the fiscal year provided in the act, commencing March 1st, 1914. In the first place, the act of Congress approved August 24, 1912, creating a legislative assembly in the Territory of Alaska (37 Stat. L. p. 512) provided that the first meeting of the legislative assembly should convene at the City of Juneau on the first Monday in March, 1913. Any act, therefore, which provided for the performance of certain essential duties prior to the first day of any month of March could not have been introduced

except with the intent that these duties could not be performed until the first day of March, 1914, for the reason that the first Monday in March, 1913, was the third day of March, 1913, and no member of the territorial legislature could have introduced an act (where the same contemplated the doing of certain things prior to any month of March) with the intention of the same having effect prior to the first day of March, 1914, for the reason that the legislature could not have been called to order until the third day of March, 1913. In view of this condition of affairs let us examine the poll tax act. Sec. 1 of the act provides:

“Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or territorial charges, within the Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.”

Section 2 then proceeds to provide the method of collecting the tax and is to be construed in the light of the well known rule of constitutional law that “due process requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him”. 8 Cyc, page 1134. Let us see then what the following section provides:

“Sec. 2. That the commissioner of each precinct



in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies."

It is the evident intention from the section above quoted that the legislature contemplated that a roll of the persons subject to the poll tax should be made up before the first of March of each year, in duplicate, one to remain in the possession of the tax collector, and one to be transmitted to the Treasurer of the Territory; that this roll with reference to this particular tax was intended to take the place of and to be similar to the ordinary assessment rolls and made up so as to give due notice to any person inquiring as to whether he had been included in the assessment of the poll tax. It provided two offices in

which the persons levied upon would find their names and provided for a published notice which would put all persons upon inquiry as to whether they were included in the levy. It contemplated that the levy should apply only to persons residing in the District. Section 3 of the act provided:

“Sec. 3. The tax herein provided for shall be paid between the first Monday in April and the first Monday in the month of August in each year.”

It is to be remembered that the act became a law on the first day of May, 1913, and that the legislature could not have contemplated the payment of the tax during the month of April, 1913. Section 8 of the act provides as follows:

“The Territorial Treasurer must, before the first Monday in March of each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts.”

For the purposes of this record we assume that it is admitted that there was no Territorial Treasurer in the Territory of Alaska until the third day of July, 1913, as the allegations in the injunction case are undenied. Furthermore it may be deduced from the statutes of the United States referring to the District of Alaska that no Territorial Treasurer could exist prior to the third day of March, 1913; so that one of the prerequisites to the collection of this tax being the making up of a roll in each of the precincts before the first of March of each year, could not have been complied with and THE ATTEMPT

## TO COLLECT THE TAX FOR THE YEAR 1913 COULD NOT POSSIBLY BE VALID.

“A levy cannot be based upon a list or roll not made until after the levy, although in the same year.” 37 Cyc., page 974.

“A statutory provision that the tax levy shall be made at a certain time of the year, or between certain dates, is generally held to be mandatory, so that a levy made at any other time is invalid.” 37 Cyc., page 975.

In view of these well known principles and in view of the evident intention of the territorial legislature to provide a systematic and formal way of collecting the tax by the performance of certain acts which could not occur until shortly prior to the first day of March, 1914, we submit that there is no ground whatever upon which to base the attempted collection of the tax or criminal prosecution of the plaintiff in error during the year 1913.

The only argument that has been advanced so far to sustain the validity of the attempted collection of the tax for the year 1913 is that of public necessity. The provisions of the act are so plain themselves that it would be nothing more or less than judicial legislation to hold that a poll tax could be collected before the first of March 1914. To say that on or about the first of May, 1913, the Alaska legislature intended to levy a tax for 1913 by the provisions of this act would be charging a body of intelligent men with giving no expression, indeed, to their intention.

It was within the power of the legislature to

have changed the date for the making up of the rolls to the first of July, 1913, or to any other date subsequent to the passage of the act, which would have made such intention clear and unequivocal. To ask that the courts hold that such intention is clear, namely, to levy a tax for the year 1913, is, we respectfully submit, an unwarranted request or tax upon the imagination of the courts.

Respectfully submitted,

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